**IN THE COURT OF APPEALS OF IOWA**

No. 9-567 / 09-0355
Filed August 6, 2009

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**JAMES MICHAEL COLEMAN,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

James Michael Coleman appeals his convictions and sentences for possession of marijuana, third offense, and unlawful possession of a prescription drug. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Jeremy Westendorf, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

**DOYLE, J.**

James Michael Coleman appeals his convictions and sentences for possession of marijuana, third offense, and unlawful possession of a prescription drug. He contends the district court erred in making a certain evidentiary ruling and denying his motion for new trial. Upon our review, we affirm.

***I. Background Facts and Proceedings*.**

On April 7, 2008, Coleman was charged by trial information with possession of a controlled substance, marijuana, third offense, in violation of Iowa Code section 124.401(5) (2007), and unlawful possession of a prescription medication, in violation of section 155A.21. From the evidence presented at trial of the underlying criminal charges against Coleman, a reasonable jury could have found the following facts:

On March 3, 2008, Coleman went to the home of his then girlfriend, Markaye Cox. Cox had sewn a seam in Coleman's coat and washed his laundry. Coleman picked up the coat and laundry from Cox's house and then went to visit friends. Coleman stayed the night at his friend Ricky Carroll's home.

The next day, Coleman's ex-girlfriend, pregnant with his child, went into labor. Coleman went to the Allen Hospital in Waterloo to await his child's birth. Waterloo Police Officer Robert Michael was also at the hospital and recognized Coleman as someone who had outstanding warrants. After confirming there was an arrest warrant for Coleman, Officer Michael arrested Coleman.

Officer Michael asked Coleman if he possessed any weapons or contraband, and Coleman retrieved a pocket knife from his right rear pocket.

Coleman was then searched. The officer discovered a small bag containing six grams of marijuana and a couple of burnt marijuana roaches in the same pocket which had contained the pocket knife. Additionally, a small pipe for smoking marijuana was discovered in Coleman's inside coat pocket, and a bottle of Nitroglycerin pills prescribed for Coleman's friend Ricky Carroll was found in Coleman's backpack.

Officer Michael observed that Coleman smelled of burnt marijuana and acted lazy and slow. Officer Michael formed the opinion that Coleman was heavily under the influence of marijuana. Officer Brian Weldon, who was also at the scene of the arrest, did not smell any odor coming from Coleman, but testified that his sense of smell was not very good. When Officer Michael located the bag in Coleman's pocket, Coleman initially claimed the substance in the bag was not marijuana. Coleman later claimed the marijuana belonged to someone else. Officer Weldon observed that Coleman was quiet and maybe a little nervous and that Coleman stated the marijuana belonged to Coleman's friend.

While Coleman was in jail, Coleman and Cox wrote letters to one another discussing, among other things, Coleman's charges in this case and another pending criminal case.[1] One of Coleman's letters to Cox stated, in relevant part:

> Now on to getting me closer to getting out of here. . . . You and [my friend] Rick need to set up an appointment with my attorney. This is what Rick needs to tell her: That the pills are his and that he has a heart condition and that I hold those pills for him just in case he can't get to his. Because I'm with or around him almost every day. Yes I had permission to have them and most times I leave them with him when I leave him. But on that day I

[1] We have corrected the spelling errors contained in quoted letters below for the purposes of this opinion.

> was rushing trying to get to the hospital to see my son born, it was an honest mistake.
>
> Now what you need to do: Tell [my attorney] that on the Monday before I was arrested I came by your house to pick up some laundry and my winter coat. You had the coat to sew the sleeve up. Tell her from time to time you do wear my things and that you had accidently left the bag of weed in my right rear pocket and I knew nothing about it, and that you left that little cigarette pipe in my coat when you had been wearing the two items out side to smoke because you couldn't smoke in the house and yet again I knew nothing about it until the police found it. Make it sound believable.

Another letter to Cox stated, in relevant part:

> Before I forget, my lawyer will be calling you soon for [a deposition]. The only new thing I need to tell you about that stuff is about the weed charge. This is what I want you to say that you put the weed in the pocket of my jeans to hide it from your dad and you forgot about it the day I came to pick up my clothes and my coat and no I would not have known that either items were in the jeans or the coat.
>
> Baby if you and your friend do a good job in [your depositions] they may just drop the charges before I have to go to trial.

Cox's letter to Coleman stated, in relevant part:

> I know I [f***ed] up Dad and I are going to talk to the cops and tell them what's up. So yeah but no matter how much you hate me or [are] mad at me I still love you and I do understand why you are mad and yes I [f***ed] up. I will fix it promise. Sorry I know you won't forgive me and I'm sorry I lied to you. I'm just a bad person I guess because I mess everything up and lose everything I love and I'm sorry I hope I don't lose you, you are my whole life baby.
>
> But I will fix it one way or another baby.

Another letter from Cox to Coleman stated:

> I know you're going to be mad at me but Monday night I tried to hurt myself because I'm the whole reason you are in there.

Prior to trial, Cox was deposed. She testified that the marijuana and pipe were hers and not Coleman's. She testified that the reason Coleman asked her

in his letters to tell his attorney that the drugs were hers was because they were actually hers. Cox further testified at her deposition that Coleman "couldn't make [her] lie, nobody could make [her] lie, [she was] telling the truth, [and] that it was [her] marijuana."

A jury trial commenced on July 1, 2008. On direct examination by the State, Cox testified that the marijuana was not hers, that she did not put the marijuana in Coleman's jeans pocket, and that she did not put the marijuana pipe in Coleman's coat pocket. She further testified that Coleman was asking her to lie for him in his letters to her.

On cross examination, Coleman's attorney presented Cox's deposition testimony for impeachment purposes. When asked by Coleman's attorney why she changed her testimony at trial, Cox testified it was "[b]ecause [she didn't] feel like lying for [Coleman] no more. Everybody tells [her] why would [she] sit in jail for somebody. There's no point to it." Cox also testified that she and Coleman had recently broken up and that she had moved in with her new boyfriend.

On redirect examination, Cox testified that she had "snitched" on Coleman in the past, and she regretted snitching on Coleman at the time she wrote her letters to Coleman. She testified that when she wrote "I know I [f***ed] up Dad and I are going to talk to the cops and tell them what's up," she was referring to Coleman's marijuana possession charge and a forgery charge pending in another criminal case.[2] Additionally, she testified that when she said in her letter she would fix it she meant she would "tell[] them that [the marijuana] was [hers]

[2] *See State v. Coleman*, No. 08-1435 (Iowa Ct. App. July 22, 2009).

when it wasn't." When asked by the State why she testified at her deposition that the marijuana was hers, she explained:

> Because when I went up there a couple of days before that, I went and seen [Coleman], of course, because at that time I still wanted to be with him, but I went there and seen him and he don't want to get to sent to prison. I don't know.

Immediately after her answer, the following exchange occurred:

> Q. Are you afraid of the defendant?
> [COLEMAN'S ATTORNEY]: Objection.
> [THE COURT]: Overruled.
> A. Yes, sometimes.
> Q. Has there been any threats made to you about your testimony in the marijuana case by the defendant?
> [COLEMAN'S ATTORNEY]: Objection.
> [THE COURT]: Overruled.
> A. Yes, sir.
> Q. Can you tell us what those were? A. When I was up there visiting him he said that if he got sent to prison, because of the marijuana or anything, that he would hurt me or something like that. So . . .
> Q. Did you take that seriously? A. Yes, sir.

On recross, Cox testified she was threatened by Coleman before her deposition took place, but she went back to visit him in prison after her deposition "because I just lied for him and I still have really deeply feelings for him and stuff . . . ."

Coleman's friend Matt Stockeland testified on Coleman's behalf. Stockeland testified that Coleman was like a brother to him and that he drove Coleman to the hospital on March 4, 2008. He testified that Coleman did not smell like marijuana when Coleman got into his car.

Coleman then testified on his own behalf. He testified that the night before his arrest, he picked up his clothes and coat from Cox's house. He admitted he had smoked marijuana with Cox in the past, but testified he had not

on that occasion. He testified he was up all night prior to his arrest due to stress about the impending birth of his child, explaining why he could have possibly looked high at the hospital. He testified he was unaware at the time of his arrest that the marijuana was in his pocket, the pipe was in his coat, and the Nitroglycerin pills were in his backpack. He testified initially he "did not know exactly how or who placed them there, but during a visit with [Cox] . . . she stated to [him] that she had placed them there." He testified that Cox put the marijuana in his pocket and jacket "because she knew that her dad wouldn't go through [his] things. She had placed them there so she could keep them concealed from her dad." He also testified that his letters were only asking Cox to tell the truth that the drugs were hers, and that was just his "style of writing." He denied ever threatening Cox and testified he did not know why she changed her testimony. As to the Nitroglycerin pills, Coleman was unsure how the pills ended up in his backpack, but explained that sometimes he held his friend's medication for him. Coleman assumed either he took the pills out of his pocket and stuck it in his backpack or that the pills ended up in his backpack while he was washing up in the bathroom. He testified that did Nitroglycerin pills did not have any street value.

Coleman's friend Ricky Carroll testified on Coleman's behalf. However, Carroll testified on cross-examination that he never gave Coleman his Nitroglycerin pills or asked Coleman to hold his medication for him. He also testified he never gave Coleman permission to have possession of his medication.

The jury found Coleman guilty as charged. Following the trial, Coleman's attorney filed a combined motion for a judgment of acquittal and a new trial. The motion cited Iowa Rule of Criminal Procedure 23(2)(*b*)(4) and (9).[3] The motion asserted, in relevant part:

> At trial, [Cox] contradicted her testimony given in a deposition in which she stated that the drugs were hers. After she testified at trial that the drugs were not hers, she was seen by one of the defense witnesses, laughing, and told him that the drugs were, in fact, hers.
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> That witness, Matt Stockeland, will appear at court and testify as to what Ms. Cox told him in the hall after she testified.

The motion was heard prior to Coleman's sentencing. Stockeland did not appear for the hearing.[4] As to the timing of Stockeland's allegation, Coleman's attorney stated that Stockeland went on vacation the same day he testified in Coleman's criminal case, and Stockeland called her after he returned from vacation a few weeks later concerning Cox's alleged statement. Coleman's attorney argued:

> I had hoped to have Mr. Stockeland here to testify as to what [Cox] told him. I just know that he did leave a voice mail for me, said that he was concerned because she did come out and she was laughing and joking around with her, I believe, boyfriend, and pretty much told the witness as well as everybody else in the hall that the drugs were in fact hers. So unless Mr. Stockeland shows up here pretty soon, I just have that information to go off of. We would request that that would be grounds for a new trial . . . .

The court overruled Coleman's motion for a new trial, explaining:

> [D]espite [Stockeland's] trial testimony as to being such a close personal friend of Mr. Coleman and having heard allegedly that [Cox] had just submitted perjured devastating testimony

[3] Coleman's motion cites rule 23 although the rule was renumbered to 2.24 in 2001. All references hereinafter will be to rule 2.24.

[4] Coleman's attorney did not subpoena Stockeland because Stockeland indicated he would appear for the hearing willingly.

> against his close personal friend, . . . all Mr. Stockeland cared to do was to simply go on vacation and a week or two or so later . . . place a phone call to an answering machine that that's been the sum substance of Mr. Stockeland's concern about the predicament of his close personal friend being wrongly convicted. . . . [I]t just doesn't bear weight for two reasons. First, Mr. Coleman . . . has demonstrated proclivity for procuring perjured testimony. Second, it just doesn't make sense if Mr. Stockeland testified as he did before this jury that he and Mr. Coleman are personal close friends that if he heard this he would simply leave on vacation, walk away from his close personal friend and let the chips fall where they may. I would assume any reasonable person if he heard such statements would immediately turn around and go back into the courtroom and say to the prosecutor, to the court, to the defense attorney, this is what I just heard. You guys should do something about this. Then we could have had him give his testimony in front of that jury and the jury could make an assessment as to whether Mr. Stockeland was telling the truth or not. . . .
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> [I]f Mr. Stockeland had testimony to give, he should have either alerted us to it when he heard it immediately . . . or at the very least been more timely than he now asserts.

Judgment was then entered, and Coleman was sentenced to a prison term not to exceed five years on the marijuana possession conviction and a fine on the unlawful possession of a prescription medication conviction.

Coleman now appeals. He contends the district court erred in allowing testimony of Coleman's alleged threat to Cox. Additionally, he argues the court erred in applying the wrong standard in considering his motion for a new trial and in denying his motion for new trial. Coleman alternatively argues his trial counsel was ineffective should we find he failed to preserve error on either of his claims.

### *II. Discussion*.

#### *A. Admission of Threat Testimony*.

On appeal, Coleman contends the district court erred in allowing testimony of Coleman's alleged threat to Cox. We generally review a district court's

evidentiary and trial objection rulings for abuse of discretion. *Kurth v. Iowa Dep't of Transp*., 628 N.W.2d 1, 5 (Iowa 2001); *State v. Tracy*, 482 N.W.2d 675, 680-81 (Iowa 1992). However, the State argues Coleman failed to preserve this issue for appellate review because his attorney did not state a specific objection to the testimony. *See State v. Maghee*, 573 N.W.2d 1, 8 (Iowa 1997) (stating that in order to preserve error, an objection must be specific enough to alert the district court to the basis for the complaint). We agree and find Coleman's challenge to this evidentiary ruling is not preserved for our review.

Coleman alternately argues his trial counsel was ineffective for failing to specifically object to the testimony, an exception to the general rule of error preservation. *See Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993). We review claims of ineffective assistance of counsel de novo. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Unless the record on direct appeal is adequate to address the issue, a claim of ineffective assistance of counsel is generally preserved for possible postconviction proceedings. *State v. Bearse*, 748 N .W.2d 211, 214 (Iowa 2008). We conclude the record in this case is adequate to decide this issue.

To establish a claim of ineffective assistance of counsel, Coleman must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Maxwell*, 743 N.W.2d at 195. A defendant's failure to prove either element by a preponderance of the evidence is fatal to the claim. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003). To establish the second element of the test, Coleman must show "there is a reasonable probability that, but for the counsel's

unprofessional errors, the result of the proceeding would have been different." *State v. Reynolds*, 746 N.W.2d 837, 845 (Iowa 2008) (citations omitted). A reasonable probability is a probability sufficient to undermine confidence in the outcome of defendant's trial. *State v. Bugley*, 562 N.W.2d 173, 178 (Iowa 1997).

Assuming without deciding that Coleman's trial counsel failed to perform an essential duty, we find Coleman suffered no prejudice. We reach this conclusion because we believe that Coleman has failed to show a reasonable probability that the outcome of the proceeding would have differed if his counsel had successfully objected to the evidence at issue here.

At trial, Officer Michael testified that Coleman smelled of marijuana and that Coleman acted lazy and slow at the time of his arrest. Officer Michael testified that he formed the opinion that Coleman was heavily under the influence of marijuana at the time of his arrest. Officer Michael further testified that Coleman's first response to finding the bag of marijuana in his pocket was that the substance in the bag was not marijuana, and not that the bag of marijuana belonged to Coleman's friend. Additionally, Coleman's letters to Cox were admitted into evidence. In his letters to Cox, Coleman requested Cox contact his attorney and tell his attorney that the marijuana and pipe belonged to Cox, not that she tell the truth. He specifically stated for her to "[m]ake it sound believable." He also stated in another letter that if she did a "good job" in her deposition, the State "may just drop the charges before [he had] to go to trial." Moreover, Coleman's friend, for whom the Nitroglycerin medication was intended, testified he did not ask Coleman to hold the medication for him or give

him permission to possession the medication, contradicting Coleman's testimony. Given the contradictions to Coleman's testimony at trial and the above-stated evidence, we find it is not reasonably probable that even in the absence of the threat evidence the jury would have accepted Coleman's explanations. We therefore find Coleman's counsel was not ineffective for failing to specifically object to the threat testimony.

***B. Motion for New Trial*.**

Coleman's next argument centers upon his motion for a new trial. The district court has "wide discretion in deciding motions for new trial." *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1993); *see also* Iowa R. App. P. 6.904(3)(*c*) ("In ruling upon motions for new trial the district court has a broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties."). We reverse only where the district court has abused that discretion. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003).

***1. Applicable Standard*.**

Coleman first contends the district court applied the wrong standard in considering his motion because the court did not specifically weigh the conflicting testimony of the witnesses and make a determination about whether or not he deserved a new trial. Coleman argues Iowa Rule of Criminal Procedure 2.24(2) requires courts to employ a "weight-of-the-evidence" standard instead of a "sufficiency-of-the-evidence" standard, citing our supreme court's decision in *State v. Ellis*, 578 N.W.2d at 659. We find no merit in Coleman's argument.

In *Ellis*, the court specifically interpreted the definition of Iowa Rule of Criminal Procedure 2.24(2)(*b*)(6). Rule 2.24(2)(*b*)(6) provides that the district court may grant a new trial "[w]hen the verdict is contrary to law or evidence." In *Ellis*, the court held that "contrary to . . . the evidence" as stated in the rule meant "contrary to the weight of the evidence" and use of the "sufficiency of the evidence" standard was not proper. The court in *Ellis* did not generalize that any motion brought under rule 2.24(2)(*b*) required employment of the weight of the evidence standard.

This is important because Coleman's motion for a new trial only cited rule 2.24(2)(*b*)(4) and (9) as grounds for the new trial. Rule 2.24(2)(*b*)(4) provides that a new trial may be granted "[w]hen the verdict has been decided by lot, or by means other than a fair expression of opinion on the part of all jurors." Rule 2.24(2)(*b*)(9) provides that a new trial may be granted "[w]hen from any other cause the defendant has not received a fair and impartial trial." Neither subsection (4) nor (9) contain "contrary to law or evidence" language. Coleman's motion does not cite rule 2.24(2)(*b*)(6) or assert that the jury's verdict was contrary to the weight of the evidence. Additionally, in arguing the motion at the sentencing hearing, Coleman's attorney did not assert that the jury's verdict was contrary to the weight of the evidence. Thus, we conclude the district court did not apply the wrong standard in considering Coleman's motion because the court was not required to weigh the witnesses' conflicting testimony under the grounds raised in the motion.

***2. Denial of Coleman's Motion*.**

Coleman argues the district court erred in denying his motion for a new trial. Based upon the grounds and claims raised by Coleman in his motion and at the sentencing hearing, we disagree.

Although Coleman's motion cited rule 2.24(2)(*b*)(4), no evidence was raised or cited to support this ground for a new trial. The only ground remaining is rule 2.24(2)(*b*)(9), providing that a new trial may be granted "[w]hen from any other cause the defendant has not received a fair and impartial trial." This ground asserted makes sense in view of the argument advanced by Coleman in his motion and at the hearing.

Coleman's motion argued that Stockeland had heard Cox allegedly state, after testifying in court, that she lied on the stand and that the drugs were hers. If this evidence were true and supported, a new trial under rule 2.24(2)(*b*)(9) may have been warranted. However, Stockeland failed to appear at the hearing to give his testimony concerning Cox's latest statement. The court considered the information given by Coleman's attorney pertaining to the new testimony, and found it did not "bear weight" given evidence that Coleman had demonstrated a proclivity for procuring perjured testimony and the fact that Stockeland did not come forward with the information for a few weeks, although Stockeland testified that he was a close personal friend of Coleman's. We agree with the court's reasoning and therefore conclude the district court did not abuse its discretion in denying Coleman's motion for a new trial.

***III. Conclusion*.**

Although we find Coleman's challenge to his evidentiary ruling issue is not preserved for our review, we conclude Coleman's counsel was not ineffective for failing to specifically object to the threat testimony. Additionally, we conclude the district court did not apply the wrong standard in considering Coleman's motion because the court was not required to weigh the witnesses' conflicting testimony in making a determination about whether or not Coleman deserved a new trial under the grounds raised in his motion. We are also in accord with the district court's reasoning and conclude the court did not abuse its discretion in denying Coleman's motion for a new trial. For these reasons, we affirm.

**AFFIRMED.**